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7 **BEFORE THE PUBLIC DISCLOSURE COMMISSION**
8 **OF THE STATE OF WASHINGTON**

9 IN RE THE MATTER OF ENFORCEMENT
10 ACTION AGAINST

11 DON BIVINS,

12 Respondent.

PDC CASE NO. 02-286¹

AMENDED/CORRECTED
FINAL ORDER²

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14 The Washington State Public Disclosure Commission (Commission) conducted an
15 adjudicative proceeding (enforcement hearing) in this matter on March 31, 2005 at the
16 Commission Offices at the Evergreen Plaza Building, 711 Capitol Way, Room 206, Olympia,
17 Washington. The hearing was held pursuant to chapter 34.05 RCW, chapter 42.17 RCW,
18 WAC 390-37, and WAC 10-08. The Commissioners present included: Michael Connelly,
19 Chair; Earl Tilly, Member; Jane Noland, Member; Bill Brumsickle, Member. Senior Counsel
20 Nancy Krier, Commission counsel, was also present.

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24 ¹ Three cases originally had this PDC case number for the purposes of investigation and hearing. For
25 clarity, the cases have been assigned separate case numbers in the final orders. They are: Don Bivins (Case No.
26 02-286); Marilyn Westlake (Case No. 05-202); Marty James (Case No. 05-203).

² This amended/corrected final order was issued following Commission consideration on June 9, 2005 of
Respondent's Request for Reconsideration of the final order previously entered.

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1 Appearing for the PDC staff were: Senior Assistant Attorney General Linda Dalton,
2 and PDC staff member Suemary Trobaugh, Political Finance Specialist 2. Also present were:
3 Vicki Rippie, PDC Executive Director.

4 Appearing for the Respondent Don Bivins³ were: attorneys Brian Wolfe (on matters
5 not directly related to Mr. Bivins' employment) and Vancouver Chief Assistant City Attorney
6 Judith Zeider (on other matters). Mr. Bivins was also present. Mr. Bivins is the Fire Chief for
7 the City of Vancouver Fire Department.

8 Mr. Wolfe and Ms. Zeider also represented Respondent Marilyn Westlake on different
9 matters (Mr. Wolfe on matters not directly related to Ms. Westlake's employment, and Ms.
10 Zeider on other matters). Ms. Westlake was also present. Ms. Westlake is the Education
11 Outreach Coordinator for the Vancouver Fire Department.

12 Also present was: attorney Thomas Burke, representing Respondent Marty James. Mr.
13 James was also present. Mr. James is the Administrator for Clark County Fire District No. 5.

14 PDC staff member Ruthann Bryant served as recorder/reporter of proceedings. The
15 proceedings were recorded. The proceedings were open to the public.

16 The hearing concerned allegations that the Respondents violated RCW 42.17.130. The
17 statute provides restrictions on the use of public facilities to support or oppose campaigns. The
18 campaign at issue involved a February 5, 2002 Emergency Medical Services (EMS) levy for
19 the Vancouver Fire Department and the Clark County Fire District No. 5.

20 I. PREHEARING PROCEDURAL MATTERS

21 Prehearing matters were governed by the procedures set out in a Prehearing Order dated
22 February 3, 2005, as supplemented in discussions with the chair Michael Connelly during a
23

24
25 ³ Mr. Bivins name is spelled correctly here but has been misspelled in some of the pleadings and other
26 materials submitted to the Commission.

prehearing conference on March 23, 2005 and subsequent procedures confirmed by the agreement of the parties by an email from Ms. Krier to the parties and chair that day.

II. OTHER PREHEARING MATTERS

Other prehearing matters were addressed on March 31, 2005, prior to the hearing. Those included:

1. Dismissal of allegations against Vancouver City Attorney Ted Gathe. The Commission unanimously dismissed the allegations.
2. Dismissal of allegations by the Respondents Bivins and Westlake concerning a press release issued February 5, 2002. The Commission unanimously dismissed the allegations.
3. A proposed Stipulation as to Facts (Stipulation), and agreement by the parties to waive oral reading of the Stipulation into the record. The Commission unanimously accepted the Stipulation, and waived oral reading. A copy of the Stipulation is attached to this Order and incorporated by reference.
4. Admission of exhibits. The parties' exhibits were admitted through the agreement of the parties (PDC Staff exhibits S-1 through S-3; and Respondents' exhibits 1-RJ through 23-RJ, 2-BW through 8-BW). Exhibits 1-BW, 9-BW and 10-BW were withdrawn by the agreement of the parties.
5. Time for presentation of case and argument. Following discussion, PDC staff were allotted 1.5 hours, and Respondents allotted 4 hours.

III. HEARING

Argument Considered

The Commission considered the briefs submitted by the parties and the oral argument of their counsel. Those briefs included: "Hearing Brief of Respondents Bivins and Westlake,"

1 "Hearing Brief of Respondent Marty James, Clark Fire District #5 Administrator," and "Staff
2 Response to Brief of Respondents Bivens (sic) and Westlake."

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4 Evidence Considered

5 The Commission considered the written and oral evidence offered by the parties. That
6 evidence included the Stipulation, the written exhibits as stipulated for entry, and the testimony
7 of witnesses as follows:

8 *Stipulation:* Stipulation as to Facts dated March 31, 2005.

9 *Exhibits:* PDC Staff exhibits S-1 through S-3 with attachments; and Respondents'
10 exhibits 1-RJ through 23-RJ, and 2-BW through 8-BW.

11 *Testimony:* The Commission considered the oral testimony of the following persons.
12 For the PDC Staff – Suemary Trobaugh and Phil Stutzman. For Respondents – Pat
13 McDonnell, Jim Crawford, Jeff Williams, Jim Demmon, Keith Flewelling, Marilyn Westlake,
14 Don Bivins and Marty James.

15 Based upon the above, the Commission makes the following findings and conclusions:

16 **IV. FINDINGS OF FACT**

17 1-16. All facts as stipulated to in the Stipulation will be designated as Findings of Fact 1-16.

18 17. The Commission finds that several of the written materials at issue were prepared by or
19 with the direction of the Respondents and were prepared and distributed using public
20 facilities. The Commission finds that several of the written materials at issue were
21 promotional for the campaign seeking the public's vote to support the EMS levy in the
22 election. Other written materials at issue were not promotional of the EMS levy
23 campaign.

24 18. The Commission finds that Exhibits 18-RJ (*Lifeline* Summer 2001 edition) and 19-RJ
25 (*Lifeline* Fall 2001 edition) were not promotional with respect to the EMS levy
26 campaign.

1 19. The Commission finds that Exhibit 20-RJ (*Lifeline* Winter 2002 edition) was
2 promotional and was intended to support the EMS levy campaign.

3 20. The Commission finds that Exhibit 9-D attached to Exhibit S-2 (the "fact sheet") was
4 not promotional with respect to the EMS levy campaign.

5 21. The Commission finds that Exhibit 21-RJ (six web pages) contained information
6 promotional of the EMS levy campaign, specifically on pages three and four.

7 22. The Commission finds that Exhibits 10-RJ and 11-RJ (news releases) were not
8 promotional with respect to the EMS levy campaign.

9 **V. CONCLUSIONS OF LAW**

10 1. The Commission has jurisdiction to hear this matter pursuant to RCW 42.17.350 et
11 seq., including RCW 42.17.370(5).

12 2. RCW 42.17.130 provides:

13 No elective official nor any employee of his office nor any person appointed to
14 or employed by any public office or agency may use or authorize the use of any
15 of the facilities of a public office or agency, directly or indirectly, for the
16 purpose of assisting a campaign for election of any person to any office or for
17 the promotion of or opposition to any ballot proposition. Facilities of public
18 office or agency include, but are not limited to, use of stationery, postage,
machines, and equipment, use of employees of the office or agency during
working hours, vehicles, office space, publications of the office or agency, and
clientele lists of persons served by the office or agency: PROVIDED, That the
foregoing provisions of this section shall not apply to the following activities:

19 (1) Action taken at an open public meeting by members of an elected
20 legislative body to express a collective decision, or to actually vote upon a
21 motion, proposal, resolution, order, or ordinance, or to support or oppose a
22 ballot proposition so long as (a) any required notice of the meeting includes the
title and number of the ballot proposition, and (b) members of the legislative
body or members of the public are afforded an approximately equal opportunity
for the expression of an opposing view;

23 (2) A statement by an elected official in support of or in opposition to any
24 ballot proposition at an open press conference or in response to a specific
25 inquiry;

1 (3) Activities which are part of the normal and regular conduct of the office
2 or agency.

- 3 3. The PDC staff has the burden to establish a violation of RCW 42.17.130.
4 4. The PDC has adopted two rules regarding RCW 42.17.130, and they are at WAC 390-
5 05-271 and -273.
6 5. The Commission unanimously concludes that the Respondent Bivins committed four
7 violations of RCW 42.17.130 by using public facilities to support a levy campaign in
8 authorizing the campaign brochure (the newsletter at Exhibit 20-RJ), by using his
9 Vancouver Fire Department vehicle to store levy campaign materials and handing out
10 the materials to campaign volunteers while on duty, by using his Vancouver Fire
11 Department telephone on several occasions to discuss campaign related activities, and
12 by using his Vancouver Fire Department computer to send campaign related e-mails on
13 approximately six occasions. The Commission concludes that under the circumstances
14 of this case forwarding unsolicited emails to Respondent Bivins' home computer for
15 later response on off-duty time was not a violation of RCW 42.17.130. The
16 Commission therefore enters the following order, and authorizes the Executive Director
17 to sign on its behalf.

18 **VI. ORDER**

- 19 1. The Respondent committed four violations of RCW 42.17.130.
20 2. The Commission imposes a penalty of \$1000 and suspends \$500 if there are no future
21 violations of RCW 42.17 by Respondent within two years of the date of this order.

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26 AMENDED/CORRECTED
FINAL ORDER

1 **VII. APPEALS**

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3 **RECONSIDERATION OF FINAL ORDER - COMMISSION**

4 Any party may ask the Commission to reconsider this final order. Parties must place
5 their requests for reconsideration in writing, include the specific grounds or reasons for the
6 request, and deliver the request to the Public Disclosure Commission Office within
7 **TWENTY-ONE (21) BUSINESS DAYS** of the date that the Commission serves this order
8 upon the party. WAC 390-37-150. Service by the Commission on a party is accomplished on
9 the date of mailing by U.S. mail if the order is mailed, or the date of personal service if
10 personal service is made. RCW 34.05.010(19). The Commission orders are generally mailed
11 via U.S. mail.
12

13 Pursuant to WAC 390-37-150, the Public Disclosure Commission is deemed to have
14 denied the petition for reconsideration if, within twenty (20) business days from the date the
15 petition is filed, the Commission does not either dispose of the petition or serve the parties with
16 written notice specifying the date by which it will act on the petition. Pursuant to RCW
17 34.05.470(5), the Respondent is not required to ask the Public Disclosure Commission to
18 reconsider the final order before seeking judicial review by a superior court.
19

20 **FURTHER APPEAL RIGHTS – SUPERIOR COURT**

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22 Pursuant to RCW 42.17.395(5), a **final order** issued by the Public Disclosure
23 Commission is subject to judicial review under the Administrative Procedures Act, chapter
24 34.05 RCW. The procedures are provided in RCW 34.05.510 - .598. Pursuant to RCW
25 34.05.542(2), a petition for judicial review must be filed with the superior court in Thurston
26

1 County or the petitioner's county of residence or principal place of business. The petition for
2 judicial review must be served on the Public Disclosure Commission and any other parties
3 within **30 days** of the date that the Public Disclosure Commission serves this final order on the
4 parties. RCW 34.05.542 (4) provides: "Service of the petition on the agency shall be by
5 delivery of a copy of the petition to the office of the director, or other chief administrative
6 officer or chairperson of the agency, at the principal office of the agency. Service of a copy by
7 mail upon the other parties of record and the office of the attorney general shall be deemed
8 complete upon deposit in the United States mail, as evidenced by the postmark."

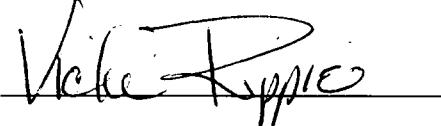
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10 If reconsideration is properly sought, the petition for judicial review must be served on
11 the Public Disclosure Commission and any other parties within thirty (30) days after the
12 Commission acts on the petition for reconsideration.
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14 **ENFORCEMENT OF FINAL ORDERS**

15 The Commission will seek to enforce this final order in superior court under RCW
16 42.17.395-.397, and recover legal costs and attorney's fees, if the penalty remains unpaid and
17 no petition for judicial review has been filed under chapter 34.05 RCW. This action will be
18 taken without further order by the Commission.
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20 So ORDERED this 14th day of June, 2005.
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22 WASHINGTON STATE PUBLIC
23 DISCLOSURE COMMISSION

24 

25 VICKI RIPP
26 Executive Director

AMENDED/CORRECTED
FINAL ORDER

1 Attachment: Stipulation as to Facts dated March 31, 2005

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3 MAILING DATE OF THIS ORDER:

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5 June 15, 2005

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7 Copies of this Order to:

8 Linda Dalton
9 Senior Assistant Attorney General
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10 Government Compliance and Enforcement Division
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